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NEW JERSEY BLURS THE CONTOURS OF THE "SUBSTANTIAL CERTAINTY" STANDARD: *MILLISON v. E.I. DU PONT DE NEMOURS & CO.*

Workers' compensation¹ laws were enacted in the United States in the early twentieth century² as a legislative response to

¹ See 1 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 1 (1985). Workers' compensation has been defined as "a mechanism for providing cash-wage benefits and medical care to victims of work-connected injuries, and for placing the cost of these injuries ultimately on the consumer, through the medium of insurance, whose premiums are passed on in the cost of the product." *Id.*; see also *Morris v. Hermann Forwarding Co.*, 18 N.J. 195, 197-98, 113 A.2d 513, 514 (1955) (purpose of workers' compensation is to have industry pay for industrial accidents and pass on cost to consumers); *Geigy Chem. Corp. v. Zuckerman*, 106 R.I. 534, 541, 261 A.2d 844, 848-49 (1970) (primary object to provide economic assistance for industrial injuries). Workers' compensation has been categorized as a form of strict liability. See W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 80, at 573 (5th ed. 1984) [hereinafter W. PROSSER & W. KEETON].

The crucial test of the applicability of workers' compensation is, whether there is a work-connected injury. 1 A. LARSON, *supra*, at § 2.10. See *Cudahy Packing Co. v. Parramore*, 263 U.S. 418, 423-24 (1923); *Geltman v. Reliable Linen & Supply Co.*, 128 N.J.L. 443, 446-47, 25 A.2d 894, 896 (1942); *Wilson v. General Motors Corp.*, 298 N.Y. 468, 472, 84 N.E.2d 781, 783 (1949).

Injured employees receive a fixed percentage of their weekly wage up to a statutory maximum, as well as hospital and medical benefits. 1 A. LARSON, *supra*, at § 1.10. In the event of loss of a limb, organ, body function, or even death, a schedule of predetermined benefits is often established. See, e.g., N.J. STAT. ANN. § 34:15-12 (West Supp. 1986) (stipulated benefits for death or loss of member(s), vision, hearing, etc.). Claims under workers' compensation acts for injuries such as pain and suffering, disfigurement, or loss of consortium typically have been denied. See *Ponder v. Southern Tea Co.*, 170 Ga. App. 819, 820, 318 S.E.2d 242, 243 (1984) (loss of consortium); *Fisher v. Consolidated Freightways, Inc.*, 12 Or. App. 417, 420, 507 P.2d 53, 55 (1973) (pain and discomfort); *Clayton v. Pizza Hut, Inc.*, 673 S.W.2d 144, 145 (Tenn. 1984) (permanent scars).

² See generally 1 A. LARSON, *supra* note 1, at § 5 (discussing origins of workers' compensation). In the early 1900's, various states created committees to study the increase of industrial accidents and to suggest remedies for them. *Id.* at § 5.20. New York, in 1910 enacted the first workers' compensation legislation. See Act of June 25, 1910, ch. 674, [1910] N.Y. Laws 1945. The statute was later held unconstitutional by the court of appeals, as an imposition of liability without fault, which constituted the taking of property without due process of law. See *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 298, 94 N.E. 431, 440 (1911). The New York State Legislature responded by amending the state constitution. See 1913 N.Y. Laws 2225, incorporated at N.Y. CONST. art. I, § 18. The United States Supreme Court upheld the constitutionality of the New York law in *New York Cent. R.R. Co. v. White*, 243 U.S. 188, 205 (1917).

The federal government adopted a workers' compensation plan in the Federal Employ-

the inadequate common law remedies available to employees injured in industrial accidents.³ In exchange for assured, predetermined benefits, workers waived their rights to traditional tort remedies against their employers.⁴ Exceptions to this "exclusive remedy rule" were initially carved out by the courts⁵ and later by

ers' Liability Act of 1908. See 35 Stat. 65, c. 149 (1908), codified as amended at 45 U.S.C. §§ 51-59 (1976). New Jersey's workers' compensation act was enacted in 1911. See 1911 N.J. Laws 95, codified at N.J. STAT. ANN. § 34:15-1 *et seq.* (West Supp. 1986).

The last such legislation was enacted by Hawaii in 1963. W. PROSSER & W. KEETON, *supra* note 1, § 80, at 573. Today approximately 90 percent of all workers are covered. U.S. CHAMBER OF COMMERCE, ANALYSIS OF WORKERS' COMPENSATION LAWS 1982, at 1 (1982). See generally Perlin, *The German and British Roots of American Workers' Compensation Systems: When is an 'Intentional Act' 'Intentional'?*, 15 SETON HALL L. REV. 849 (1985) (European acts were source of American enactments); Rhodes, *The Inception of Workmen's Compensation in the United States*, 11 ME. L. REV. 35 (1917) (early history of workers' compensation legislation).

³ 1 A. LARSON, *supra* note 1, at § 4. An estimated 70 to 94 percent of injuries from industrial accidents went uncompensated by the common law. W. PROSSER & W. KEETON, *supra* note 1, § 80, at 572 n.43. Employees were unable to recover for these injuries largely because of the "unholy trinity" of common law defenses available to employers: contributory negligence, assumption of risk and the fellow-servant rule. *Id.* at 569. An employee was required to exercise reasonable care for his own safety, therefore contributory negligence would bar recovery. *Schlemmer v. Buffalo, R. & P. Ry.*, 220 U.S. 590, 596 (1911). By accepting employment, a worker assumed the risk of hazards normally incident to the job. *Cooper v. Mayes*, 234 S.C. 491, 495, 109 S.E.2d 12, 13 (1959). Finally, the fellow-servant rule prohibited an employee from suing his employer for the negligence of a co-worker. *Farwell v. Boston & W. Ry.*, 45 Mass. (4 Met.) 49 (1842).

⁴ See *Lee v. American Enka Corp.*, 212 N.C. 455, 462, 193 S.E. 809, 812 (1937); 2A A. LARSON, *supra* note 1, § 1.20, at 2 (1985). This quid pro quo has been viewed as equally balanced. See *id.* In exchange for relinquishing the right to a tort claim with dubious chances of recovery, an employee received speedy and assured benefit payments. See *Jensen v. Southern Pac. Co.*, 215 N.Y. 514, 527, 109 N.E. 600, 603 (1915), *rev'd on other grounds*, 244 U.S. 205 (1917); see also Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641, 1641 (1983) (employees relinquishing right to sue not a great loss at time of enactments). Although the employer became strictly liable for his employees' injuries, he was relieved of defending burdensome tort claims. See *Galimi v. Jetco.*, 514 F.2d 949, 952 (2d Cir. 1975); 2A A. LARSON, *supra* note 1, at § 65.11. It was believed that this balance would benefit society by avoiding litigation and lowering the costs of accidents. See *Galimi*, 514 F.2d at 952; *Craft v. Gulf Lumber Co.*, 151 La. 281, 284-85, 91 So. 736, 737 (1922).

⁵ See *Boek v. Wong Hing*, 180 Minn. 470, 231 N.W. 233 (1930). The remedy provided in workers' compensation acts is generally exclusive of all other statutory or common law remedies. See, e.g., N.J. STAT. ANN. § 34:15-8 (West Supp. 1986). The first intentional tort exception to the exclusive remedy rule was created for the assault and battery of an employee by his employer. See *Boek*, 180 Minn. at 471, 231 N.W. at 234 (1930); *Rumbolo v. Erb*, 19 N.J. Misc. 311, 311, 20 A.2d 54, 54 (1941), *overruled on other grounds*, *Martin v. Snuffy's Steak House*, 46 N.J. Super. 425, 440, 134 A.2d 789, 798 (1957); *Le Pochat v. Pendleton*, 187 Misc. 296, 298, 63 N.Y.S.2d 313, 315 (1946), *aff'd mem.*, 271 App. Div. 964, 68 N.Y.S.2d 594 (1st Dep't 1947). Some jurisdictions have expanded the intentional tort exception to include false imprisonment, see *Skelton v. W.T. Grant Co.*, 331 F.2d 593, 595 (5th Cir. 1964), *cert.*

state legislatures.⁶ As the likelihood and amount of recovery increased under modern tort law,⁷ injured employees sought to fit their claims within one of these exceptions so as to be able to sue in tort.⁸ Employees afflicted with occupational diseases have attempted to characterize their disabilities as the result of intentional employer conduct that falls within a tort exception to workers' compensation laws.⁹ Recently, in *Millison v. E.I. du Pont de*

denied, 379 U.S. 830 (1964); *Schutt v. Lado*, 138 Mich. App. 433, 437, 360 N.W.2d 214, 216 (1984), and the intentional infliction of emotional distress by an employer, see *Cohen v. Lion Prods. Co.*, 177 F. Supp. 486, 489 (D. Mass. 1959). See generally Page, *The Exclusivity of the Workmen's Compensation Remedy: The Employee's Right to Sue His Employer in Tort*, 4 B.C. INDUS. & COM. L. REV. 555, 559-67 (1963) (discussing creation and reasoning of judicial exceptions).

⁶ See, e.g., ARIZ. REV. STAT. ANN. § 23-1022(A), (B) (1985) (willful misconduct of employer allows suit); KY. REV. STAT. ANN. § 342.610(4) (Michie/Bobbs-Merrill 1983) (deliberate intention of employer to produce injury or death allows suit); LA. REV. STAT. ANN. § 23:1032 (West 1986) (employer civilly and criminally liable for "intentional act"); N.J. STAT. ANN. § 34:15-8 (West Supp. 1986) ("intentional wrong" of employer not covered); S.D. CODIFIED LAWS ANN. § 62-3-2 (1978) (employer's "intentional tort" preserves common law rights); TEX. REV. CIV. STAT. ANN. art. 8306, § 5 (Vernon 1967) (willful act, omission, or gross negligence of employer causing employee's death allows suit); W.VA. CODE § 23-4-2(2) (1985) ("deliberate intention").

The states which allow exceptions to the exclusivity of their workers' compensation acts, whether by case law or legislation, are in the minority. See Note, *Blankenship v. Cincinnati Milacron Chemicals, Inc.: Some Fairness for Ohio Workers and Some Uncertainty for Ohio Employers*, 15 U. Tol. L. Rev. 403, 421 (1983).

⁷ See Note, *supra* note 4, at 1645. Modern tort law has made negligence easier to prove. *Id.* The three greatest bars to recovery have lost much of their power. See W. PROSSER & W. KEETON, *supra* note 1, at §§ 65-68, 80. Comparative negligence has replaced contributory negligence in at least 40 states. See *id.* at § 67, at 471. Assumption of risk has either been abolished or "seriously modified" in 19 jurisdictions. *Id.* at § 68, at 496 n.56. The fellow-servant rule has been restricted "as its hardships upon labor became apparent." *Id.* at § 80, at 572.

⁸ See, e.g., *Fountain v. Shoney's Big Boy Inc.*, 168 Ga. App. 489, 489, 309 S.E.2d 671, 671 (1983) (employee claimed employer liable for assault committed by co-worker); *Glenn v. Farmland Foods, Inc.*, 344 N.W.2d 240, 241 (Iowa 1984) (employee sued employer for gross negligence of co-worker); *Doe v. St. Michael's Medical Center*, 184 N.J. Super 1, 3-4, 445 A.2d 40, 42-43 (1982) (employee claimed employer had dual capacity as landlord and employer and thus liable for assault committed by third party).

⁹ See 1B A. LARSON, *supra* note 1, at § 41 (1986). Occupational disease is "any disease arising out of exposure to harmful conditions of the employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally." *Id.* Every jurisdiction has general occupational disease coverage. See, e.g., N.J. STAT. ANN. § 34:15-30 (West Supp. 1986). Occupational diseases are typically covered through a statutory definition, an interpretation of the term "injury," a stipulated list of diseases, or by a separate act. See, e.g., OR. REV. STAT. § 656.802 (1985) (definition); CAL. LAB. CODE § 3208 (Deering 1976) ("injury" interpretation); PA. STAT. ANN. tit. 77, § 1208 (Purdon Supp. 1986) (list of diseases); ILL. ANN. STAT. ch. 48, §§ 172.36-59 (Smith-Hurd 1986) (separate act).

By 1978 an estimated two million workers had been disabled by occupational disease. Edes, *Compensation For Occupational Diseases*, 31 LAB. L.J. 595, 596 (1980). Approxi-

Nemours & Co.,¹⁰ the Supreme Court of New Jersey redefined the standard for determining whether an employer's conduct constitutes an intentional wrong against an employee within the meaning of the New Jersey Workmen's Compensation Act.¹¹

In *Millison*, the plaintiffs, former employees of E.I. du Pont de Nemours & Co. ("du Pont"), claimed that du Pont had intentionally injured them through deliberate exposure to asbestos.¹² The plaintiffs further alleged that du Pont had conspired with its codefendants, du Pont physicians, to fraudulently conceal the existence of the asbestos-related diseases contracted by its employees.¹³ The plaintiffs contended that these actions constituted intentional wrongs under the New Jersey Workmen's Compensation Act ("the

mately one out of five individuals severely disabled by an occupational disease receives no disability benefits. *Id.* Workers' compensation only replaces approximately five percent of lost income of occupational disease sufferers. *Id.* at 597. Sixty percent of all occupational disease workers' compensation awards are initially denied, as compared to only ten percent of job injury claims. *Id.* "[W]orkers disabled from an occupational disease [do not] receive an equitable trade-off when they give up their legal rights to sue employers for work-related illnesses in exchange for workers' compensation benefits." *Id.* at 599.

As a result, employees afflicted with occupational diseases often attempt to characterize their injuries as intentionally inflicted in order to escape the limited remedies of workers' compensation laws. See *Boudeloche v. Grow Chem. Coatings Corp.*, 728 F.2d 759, 760 (5th Cir. 1984) (per curiam); *Johns-Manville Prods. Corp. v. Contra Costa Superior Court*, 27 Cal. 3d 465, 469, 612 P.2d 948, 950, 165 Cal. Rptr. 858, 860 (1980); *Genson v. Bofors-Lake-way, Inc.*, 122 Mich. App. 470, 473, 332 N.W.2d 507, 508 (1983); *Blankenship v. Cincinnati Milacron Chems., Inc.*, 69 Ohio St. 2d 608, 609, 433 N.E.2d 572, 574 (1982), cert. denied, 459 U.S. 857 (1982); see generally 2A A. LARSON, *supra* note 1, at § 68.32(c).

Diseases associated with asbestos exposure are a major category of occupational diseases, with an estimated 27.5 million workers in the United States incurring such exposure between 1940 and 1979. See Comment, *Issues in Asbestos Litigation*, 34 HASTINGS L.J. 871, 871 (1985). Over 30,000 claims have been filed against asbestos manufacturers since the early 1970s, and tens of thousands more may be filed in the future. D. HENSLER, W. FELSTINER, M. SELVIN & P. EBNER, *ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS* 1 (1985) [hereinafter *ASBESTOS*].

¹⁰ 101 N.J. 161, 501 A.2d 505 (1985).

¹¹ See *id.* at 178, 501 A.2d at 514.

¹² See *id.* at 166, 501 A.2d at 508.

¹³ See *id.*, 501 A.2d at 508. Asbestos is an incombustible, nonconducting, chemically resistant mineral that readily separates into long flexible fibers. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 126 (1963); Mehatty, *Asbestos-Related Lung Disease*, 16 FORUM 341, 342 (1980).

Inhalation of asbestos is known to cause three diseases: asbestosis, lung cancer, and mesothelioma. *ASBESTOS*, *supra* note 9, at 13. Asbestosis is caused by scar tissue formed by inhaled asbestos dust; the scar tissue causes a decrease in pulmonary function, literally strangling the lungs. *Id.* at 14. Lung cancer caused by asbestos is characterized by its development in the lower lobes of the lungs, whereas lung cancer from other causes is found in the upper lobes. *Id.* Mesothelioma is a rare cancer that begins in the lining of the lungs, abdominal cavity, or heart. *Id.*

Act"),¹⁴ and thus gave rise to tort claims distinct from the limited benefits available under the Act.¹⁵ The trial court granted summary judgment to du Pont, based upon the "exclusive remedy" provision in the Act, but denied it to the company physicians.¹⁶ The Appellate Division affirmed the judgment as to du Pont, but reversed in favor of the physicians' motion for summary judgment.¹⁷

The Supreme Court of New Jersey found that the employees had not stated a claim against du Pont for the alleged intentional exposure to asbestos, despite du Pont's awareness of the risk of injury.¹⁸ The majority adopted the "substantial certainty" test formulated by Dean Prosser and contained in the Restatement (Second) of Torts as the standard for determining whether an intentional wrong was committed under the Act.¹⁹ A valid claim, under this test, must allege that an employer knew with substantial cer-

¹⁴ N.J. STAT. ANN. §§ 34:15-1 to -128 (West Supp. 1986).

¹⁵ See *Millison*, 101 N.J. at 170, 501 A.2d at 510. Section 34:15-8 of New Jersey's Workmen's Compensation law provides, in pertinent part, that adoption of workers' compensation:

[S]hall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in this article. . . .

If an injury or death is compensable under this article, a person shall not be liable to anyone at common law or otherwise on account of such injury or death for any act or omission occurring while such person was in the same employ as the person injured or killed, except for intentional wrong.

N.J. STAT. ANN. § 34:15-8 (West Supp. 1986). Prior to 1961 the only exception to the exclusivity of New Jersey's Act was for assault and battery. See *Rumbolo v. Erb*, 19 N.J. Misc. 311, 20 A.2d 54 (1941), *overruled on other grounds*, *Martin v. Snuffy's Steak House*, 46 N.J. Super. 425, 440, 134 A.2d 789, 798 (1957). In 1961 the Act was amended to include the intentional wrong exception. See 1961 N.J. Laws c. 2, p. 14, § 1.

¹⁶ See *Millison*, 101 N.J. at 167, 501 A.2d at 508.

¹⁷ See *id.*, 501 A.2d at 508.

¹⁸ See *id.* at 179, 501 A.2d at 514-15.

¹⁹ *Id.* at 177-78, 501 A.2d at 514. Prosser's "substantial certainty" standard provides that an individual has the intent to bring about given consequences not only if he acts for the sole purpose of bringing them about, but also if he acts "having in mind a belief (or knowledge) that given consequences are substantially certain to result from the act." W. PROSSER & W. KEETON, *supra* note 1, § 8, at 34 (footnotes omitted). "[T]he mere knowledge and appreciation of risk—something short of substantial certainty—is not intent." *Id.* at 36.

The Restatement (Second) of Torts states that a person acts with intent if the "actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." RESTATEMENT (SECOND) OF TORTS § 8A (1965). The official comment to the Restatement explains that if an actor is "substantially certain [of the consequences] to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result." *Id.* at § 8A comment b.

tainty that an injury would occur to its employees.²⁰

According to the *Millison* majority, the plaintiffs' first count did not sufficiently allege that the defendants knew with substantial certainty that its conduct would produce injury.²¹ The plaintiffs' claim, therefore, only amounted to an accusation that du Pont took risks with the health of its employees.²² "[M]ere knowledge and appreciation of a risk—even the strong probability of a risk," according to the court, "come[s] up short of the 'substantial certainty' needed to find an intentional wrong."²³ The majority concluded that du Pont's exposure of its employees to an asbestos-laden work environment did not constitute an intentional wrong.²⁴ The court determined, however, that du Pont's actions in conjunction with its physicians may have constituted the intentional wrong of deceit.²⁵ The risk of an employer's fraud is not one an employee assumes; nor does employer fraud arise out of the employment.²⁶ Thus, according to the court, the allegation of the clear intentional wrong of fraud was sufficient to state a claim for aggravation of the plaintiffs' illnesses.²⁷

Justice Handler, while concurring with the majority's adoption of the "substantial certainty" standard, dissented as to the majority's application of that standard to the facts.²⁸ The dissent contended that despite the court's express acceptance of the "substantial certainty" standard, the majority had applied the older "deliberate intent" criterion previously used as the test for the intentional wrong exception to the Act.²⁹ Justice Handler concluded

²⁰ See, e.g., *Boudeloche v. Grow Chem. Coatings Corp.*, 728 F.2d 759, 761 (5th Cir. 1984) (per curiam) (order to employee to work in tank filled with noxious fumes with knowledge of danger satisfies "substantial certainty" standard); *VerBouwens v. Hamm Wood Prods.*, 334 N.W.2d 874, 876 (S.D. 1983) (knowledge of probable risk of injury not same as substantial certainty).

²¹ See *Millison*, 101 N.J. at 178, 501 A.2d at 514.

²² See *id.* at 178, 501 A.2d at 514-15.

²³ *Id.* at 179, 501 A.2d at 514-15.

²⁴ See *id.*, 501 A.2d at 514.

²⁵ See *id.* at 181-82, 501 A.2d at 516.

²⁶ *Id.* at 182, 501 A.2d at 516.

²⁷ See *id.* at 181-82, 501 A.2d at 516.

²⁸ See *id.* at 190, 501 A.2d at 520 (Handler, J., concurring in part and dissenting in part).

²⁹ See *id.* at 191-92, 501 A.2d at 521-22 (Handler, J., concurring in part and dissenting in part).

"Deliberate intent" has been defined as "an actual, specific" desire to injure. *Phifer v. Union Carbide Corp.*, 492 F. Supp. 483, 485 (E.D. Ark. 1980); see also *Tyner v. Fort Howard Paper Co.*, 708 F.2d 517, 518 (10th Cir. 1983) (same). It does not include willful, wanton,

that a "conscientious" application of the "substantial certainty" standard to the plaintiffs' allegations should have resulted in both claims being tried before a jury.³⁰

In *Millison*, the New Jersey Supreme Court attempted to promulgate a test for determining when employer misconduct is sufficiently egregious to entitle the victimized employee to abandon the workers' compensation remedy in favor of a suit in tort.³¹ It is submitted that although the court purported to adopt the progressive "substantial certainty" standard for analyzing employer behavior, in actuality it applied New Jersey's traditional "deliberate intent" test to du Pont's conduct. This misapplication may have arisen from the court's inadequate definition of the requisite intent, as well as from judicial reluctance to interfere in the workers' compensation system. As a result, this decision has blurred the contours of the intentional wrong exception to New Jersey's Workmen's Compensation Act. This Comment will examine this growing area of law and will suggest that had the *Millison* court indeed applied the "substantial certainty" standard, the rights of workers afflicted with occupational diseases to pursue a remedy outside the strictures of workers' compensation would be far clearer than they are at present. It will also be suggested that strong public policy considerations dictate removal of the "deliberate intent" standard from the tort exception to workers' compensation.

reckless, or grossly negligent acts. See *Keating v. Shell Chem. Co.*, 610 F.2d 328, 332 (5th Cir. 1980); *Ulicny v. National Dust Collector Corp.*, 391 F. Supp. 1265, 1268 (E.D. Pa. 1975); *Finch v. Livingly*, 42 App. Div. 2d 1035, 1035, 348 N.Y.S.2d 266, 268 (mem.) (4th Dep't 1973). Nor can "deliberate intent" be constructive. See *Winterroth v. Meats, Inc.*, 10 Wash. App. 7, 12, 516 P.2d 522, 525 (1973). Thus, this standard is at variance with that advocated by Dean Prosser and the Restatement. See *supra* note 19; see also Note, *Torts—Intentional Torts In The Workplace—Further Erosion of the Workers' Compensation Exclusive Remedy Bar to Tort Actions*—Blankenship v. Cincinnati Milacron Chems. Corp., Inc., 10 N. Ky. L. Rev. 355, 358 (1983) (purposeful or "actual" intent to harm necessary element of common law action).

The "deliberate intent" exception has been viewed as a narrow exception. See *Copeland v. Johns-Manville Prods. Corp.*, 492 F. Supp. 498, 501 (D.N.J. 1980); see also *Shearer v. Homestake Mining Co.*, 557 F. Supp. 549 (D.S.D. 1983) (expansive reading of intentional tort exception would thwart purposes of workers' compensation), *aff'd*, 727 F.2d 707 (8th Cir. 1984).

³⁰ See *Millison*, 101 N.J. at 195, 501 A.2d at 523 (Handler, J., concurring in part and dissenting in part).

³¹ See *id.* at 176, 501 A.2d at 513-14.

"SUBSTANTIAL CERTAINTY" VERSUS "DELIBERATE INTENT"

The majority of jurisdictions that have enacted workers' compensation acts containing an intentional tort exception to their acts' exclusivity have statutorily conditioned application of the exception on proof that the employer acted with a "deliberate intent" to harm the employee.³² Under New Jersey's Act, in order for an employee to sue in tort, the injury complained of must be the result of an "intentional wrong."³³ The intentional wrong exception to New Jersey's Act had previously been interpreted as requiring proof of "deliberate intent."³⁴ Insofar as the intentional wrong exception eliminates the exclusivity rule of the Act and allows a tort remedy,³⁵ it is suggested that a tort law definition of intent, rather than that of traditional workers' compensation law, should be applied to determine the existence of an intentional wrong. In *Millison*, the Supreme Court of New Jersey purported to adopt the tort "substantial certainty" definition of intent.³⁶ In its analysis, however, the court approvingly cited cases which required, as a necessary allegation, a demonstration of an actual, deliberate desire of the employer to cause harm.³⁷ The majority thus equated

³² See, e.g., KY. REV. STAT. ANN. § 342.610(4) (Michie/Bobbs-Merrill 1983); MD. ANN. CODE art. 101, § 44 (1985); WASH. REV. CODE ANN. § 51.24.020 (1984); W. VA. CODE § 23-4-2(2) (1985).

³³ See N.J. STAT. ANN. § 34:15-8 (West Supp. 1986).

³⁴ See *Bryan v. Jeffers*, 103 N.J. Super. 522, 523-24, 248 A.2d 129, 129 (App. Div. 1968) (per curiam), cert. denied, 53 N.J. 581, 252 A.2d 157 (1969). It has been held that neither allegations of failure to provide known safety protections, nor allegations of exposure of employees to asbestos meets the "deliberate intent" standard. See *Arcell v. Ashland Chem. Co.*, 152 N.J. Super. 471, 495-96, 378 A.2d 53, 65 (Law Div. 1977) (failure to provide safety measures); *Copeland v. Johns-Manville Prods. Corp.*, 492 F. Supp. 498, 500 (D.N.J. 1980) (intentional exposure to asbestos insufficient to meet New Jersey deliberate intent requirement); *Petruska v. Johns-Manville*, 83 F.R.D. 39, 40 (E.D. Pa. 1979) (same).

³⁵ See *Estelle v. Board of Educ.*, 26 N.J. Super. 9, 26, 97 A.2d 1, 9 (1953) (workers' compensation law does not bar a common law suit for injury not covered by the Act), modified, 14 N.J. 256, 102 A.2d 44 (1954).

³⁶ See *Millison*, 101 N.J. at 178, 501 A.2d at 514. Although the court embraces the "substantial certainty" standard, it provided no support for this action, see *id.*, despite the existence of case law on point in other jurisdictions. See *Bodeloche v. Grow Chem. Coatings Corp.*, 728 F.2d 759 (5th Cir. 1984) (per curiam); *Spivey v. Battaglia*, 258 So. 2d 815 (Sup. Ct. Fla. 1972); *VerBouwens v. Hamm Wood Prods.*, 334 N.W.2d 874 (S.D. 1983).

³⁷ See *Millison*, 101 N.J. at 170-73, 501 A.2d at 510-11. The "deliberate intent" standard has been used in a number of jurisdictions, including New Jersey prior to *Millison*. See *supra* note 34. Thus the court was able to cite a number of cases employing the "deliberate intent" standard. See *Millison*, 101 N.J. at 170-73, 501 A.2d at 511. These cases provide strong support for the requirement of deliberate, actual, specific intent to injure as a necessary element of the intentional tort exception. See *id.* at 171-73, 501 A.2d at 511.

"substantial certainty" with "virtual certainty."³⁸ Finding no differences between "substantial certainty" and "deliberate intent," the court concluded that the "substantial certainty" standard was not a repudiation of the older test.³⁹ It is submitted, however, that these two standards are mutually inconsistent, and that an express adoption of "substantial certainty" necessarily invalidates the application of "deliberate intent."⁴⁰ The court's failure to clearly differentiate between these two standards of intent has served to infuse this area with uncertainty.

Interestingly, the court did not resort to an express intent analysis when considering the plaintiffs' fraudulent concealment claim.⁴¹ Fraudulent concealment was found to be intentional on its

³⁸ See *Millison*, 101 N.J. at 178, 501 A.2d at 514. The *Millison* court relied upon *Blankenship v. Cincinnati Milacron Chems., Inc.*, 69 Ohio St. 2d 608, 621, 433 N.E.2d 573, 581 (1982) (Locher, J., concurring in part and dissenting in part), *cert. denied*, 459 U.S. 857 (1982), to demonstrate the equivalence of "substantial" and "virtual" intent. It is asserted, however, that these adjectives are not synonyms; rather they describe differing degrees, in this instance, of knowledge. "Substantial" has been defined as "to a large degree," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1963), while "virtual" signifies "effectively" that which has been stated. *Id.* at 2556. "Virtually certain" is another way to say "actually certain," or "deliberately." It is contended this imprecision contributes to the difficulty in determining what standard the court is actually applying. In equating "deliberate intent" with "substantial certainty," the court has added a great deal of confusion to New Jersey's workers' compensation law.

³⁹ See *Millison*, 101 N.J. at 178, 501 A.2d at 514. The court declared that the "substantial certainty" standard did not overrule the "deliberate intent" standard of *Bryan v. Jeffers*, 103 N.J. Super. 522, 248 A.2d 129 (App. Div. 1968) (per curiam), *cert. denied*, 53 N.J. 581, 252 A.2d 157 (1969). See *Millison*, 101 N.J. at 178, 501 A.2d at 514. In his dissent, Justice Handler contended that the majority's "substantial certainty" standard did in fact repudiate *Bryan* and its progeny. See *id.* at 192, 501 A.2d at 521 (Handler, J., concurring in part and dissenting in part).

⁴⁰ Cf. RESTATEMENT (SECOND) OF TORTS §8A comment b (1965) ("substantial certainty" includes constructive intent). Constructive intent was clearly rejected in New Jersey in *Bryan*, 103 N.J. Super. at 523, 248 A.2d at 130; see also *Phifer v. Union Carbide Corp.*, 492 F. Supp. 483, 485 (E.D. Ark. 1980) (employer substantially certain injury to occur does not deliberately intend to harm).

Significantly, the field of liability insurance law distinguishes the "substantial certainty" standard from the "deliberate intent" standard. See *Ambassador Ins. Co. v. Montes*, 76 N.J. 477, 488-89, 388 A.2d 603, 609 (1978) (Pashman, J., concurring). The difference in the standards in the insurance context turns on the notion that a "substantially certain" actor "intends the natural and probable consequences of his acts" while a person acting "deliberately" causes an "intended result of an intended act." See *id.* at 488-89, 388 A.2d at 609 (Pashman, J., concurring). As workers' compensation is an insurance-based mechanism, see *Riesefeld, Forty Years of American Workmen's Compensation*, 35 MINN. L. REV. 525, 529 (1951), the interpretation given "deliberate intent" by the insurance law should be noted.

⁴¹ See *Millison*, 101 N.J. at 182, 501 A.2d at 516. While the court undertook a comprehensive review of intent for the first cause of action, see *id.* at 169-73, 176-79, 501 A.2d at

face.⁴² It is submitted that the court should have used the plaintiffs' second claim as an opportunity to further explicate the scope and application of the intent standard. Instead, the court simply concluded that there are obvious differences between an employer maintaining a workplace that will cause illnesses without informing employees, and not informing employees that they have in fact contracted those illnesses.⁴³ The court's determination of the second claim was based upon these alleged differences.⁴⁴ The differences between the two situations are, however, anything but apparent under the "substantial certainty" standard.

It logically follows that if du Pont knew to a substantial certainty that continued exposure aggravated the condition of asbesto-disease sufferers, it also had to know to a substantial certainty that the initial exposure to asbestos is harmful.⁴⁵ The failure to reveal either known risk is, therefore, similarly intentional. Furthermore, if du Pont had a duty not to conceal the existence of disease from a worker, it should also have had a duty to inform the employee of the potential for occupational disease.⁴⁶ Insofar as

509-11, 514-15, the second claim received only a cursory review. *See id.* at 181-82, 501 A.2d at 516.

⁴² *See id.*, 501 A.2d at 516. The court described the allegation of fraudulent concealment as as "intentionally-deceitful action." *Id.*, 501 A.2d at 516.

⁴³ *See id.* at 182, 501 A.2d at 516.

⁴⁴ *See id.* at 182, 501 A.2d at 516. A single case was cited by the court to support its disposition of the second claim. *Id.* at 182-83, 501 A.2d at 516 (citing *Johns-Manville Prods. Corp. v. Contra Costa Superior Court*, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980)). In *Contra Costa*, the Supreme Court of California held that an employer's intentional exposure of an employee to asbestos was not a basis for a tort claim, but that an employer's alleged fraudulent concealment of disease from an afflicted worker stated a common law claim. *See Contra Costa*, 27 Cal. 3d at 474-77, 612 P.2d at 954-55, 165 Cal. Rptr. at 864-65.

⁴⁵ *See Millison*, 101 N.J. at 193-94, 501 A.2d at 522 (Handler, J., concurring in part and dissenting in part). While Judge Handler agreed that there was a triable issue as to fraudulent concealment, he declared that "[i]t is unclear why a triable issue is not also presented as to whether [the defendants] . . . had knowledge to a substantial certainty associated with the initial asbestos exposure in the plants. . . ." *Id.*, 501 A.2d at 522 (Handler, J., concurring in part and dissenting in part).

⁴⁶ New Jersey has enacted a number of statutes to protect workers. The "Worker and Community Right to Know Act," N.J. STAT. ANN. §§ 34:5A-1 to -31 (West Supp. 1986), established a "comprehensive program for the disclosure of information about hazardous substances in the workplace" because "individuals have an inherent right to know the full range of the risks they face" on the job. *Id.* at § 34:5A-2. The New Jersey Legislature has also sought to "reduce asbestos-related hazards by . . . [e]ncouraging competence, knowledge, and reduced exposure to asbestos . . ." N.J. STAT. ANN. § 34:5A-33 (West Supp. 1986).

Finally, the New Jersey Legislature has enacted the "Worker Health and Safety Act," N.J. STAT. ANN. §§ 34:6A-1 to -24 (West Supp. 1986) which requires employers to provide a

both of the plaintiffs' claims involved the factual issue of the extent of du Pont's knowledge, both should have been presented to a jury. Instead, the court treated the claims as distinct.⁴⁷ It is submitted, therefore, that this analysis of du Pont's knowledge is illogical and resulted from the court's failure to properly apply the "substantial certainty" standard.

A WAY OUT OF THE MORASS

The *Millison* case presented the New Jersey Supreme Court with an opportunity to liberalize New Jersey's workers' compensation laws as they apply to employees disabled by occupational diseases.⁴⁸ Not surprisingly, however, the court was reluctant to fully apply the "substantial certainty" standard.⁴⁹ This reticence may have stemmed from the judiciary's traditional reluctance to enter into what is viewed as the legislative domain.⁵⁰ Because compensation acts are generally liberally construed,⁵¹ few courts have been

"reasonably safe and healthful" work environment. *Id.* at § 34:6A-3. The Commissioner of the Department of Labor and Industry can enforce an order to correct a safety violation, *id.* at § 34:6A-7, and employers are liable for civil fines ranging from \$25.00 to \$500.00 for each day the violations exist, *id.* at § 34:6A-19.

It is submitted that allowing the plaintiffs' first cause of action to go to trial would be in furtherance of these legislative goals.

⁴⁷ See *Millison*, 101 N.J. at 181-82, 501 A.2d at 516.

⁴⁸ See Note, *supra* note 4, at 1648. The present system has failed to properly compensate employees and failed to induce employers to make work environments safer. See *id.*

Millison may affect a large number of future occupationally disabled plaintiffs. It has been estimated that by the mid-1980's upwards of 3600 asbestos-related claims will have been filed in federal and state courts in New Jersey. See ASBESTOS, *supra* note 9, at 26. The "dual injury" result reached in *Millison* is believed to be of "enormous potential importance" because of the increasing amount of asbestos-exposure litigation. See 2A A. LARSON, *supra* note 1, § 68.32(c), at 13-55.

⁴⁹ See *Millison*, 101 N.J. at 179, 501 A.2d at 514-15.

⁵⁰ See *id.* at 179-81, 501 A.2d at 515-16. The *Millison* court is not alone in its fear that an expansion of intentional tort exceptions by the courts would upset the delicate balance of a workers' compensation system. See *Johns-Manville Prods. Corp. v. Contra Costa Superior Court*, 27 Cal. 3d 465, 474, 612 P.2d 948, 953, 165 Cal. Rptr. 858, 863 (1980); *Kofron v. Amoco Chems. Corp.*, 441 A.2d 226, 231 (Del. 1982); *VerBouwens v. Hamm Wood Prods.*, 334 N.W.2d 874, 877 (S.D. 1983) (Wollman, J., concurring specially); see also Note, *supra* note 4, at 1654 (preferable to defer to legislature to modify workers' compensation).

⁵¹ See, e.g., *Wenzel v. Zantop Air Transp.*, 94 N.J. Super. 326, 330, 228 A.2d 104, 107, *aff'd*, 97 N.J. Super. 264, 235 A.2d 29 (1967); *Wolfe v. Sibley, Lindsay & Curr Co.*, 36 N.Y.2d 505, 508, 330 N.E.2d 603, 605, 369 N.Y.S.2d 637, 640 (1975); *Guerra v. Workers' Compensation Appeals Bd.*, 168 Cal. App. 3d 195, 200, 214 Cal. Rptr. 58, 60 (1985).

Some workers' compensation statutes contain provisions mandating liberal construction in favor of employees. See, e.g., OHIO REV. CODE ANN. § 4123.95 (Baldwin 1980).

willing to expand exceptions to these acts.⁵² Indeed, in some jurisdictions, courts have refused to create any judicial exceptions to workers' compensation laws.⁵³ Courts which have attempted to expand an exception to the exclusivity of workers' compensation acts often have been rebuffed by the legislature.⁵⁴ It is submitted, however, that the *Millison* court's adoption of the "substantial cer-

⁵² See *Billy v. Consolidated Mach. Tool Corp.*, 51 N.Y.2d 152, 159, 412 N.E.2d 934, 939, 432 N.Y.S.2d 879, 883 (1980); *Crespi v. Ihrig*, 99 App. Div. 2d 717, 718, 472 N.Y.S.2d 324, 324 (1st Dep't), *aff'd mem.*, 63 N.Y.2d 716, 469 N.E.2d 526, 480 N.Y.S. 209 (1984); *Cooper v. Queen*, 586 S.W.2d 830, 833 (Tenn. Ct. App. 1979).

⁵³ See, e.g., *Kofron v. Amoco Chems. Corp.*, 441 A.2d 226, 231 (Del. 1982); *Lockard v. St. Maries Lumber Co.*, 76 Idaho 506, 509, 285 P.2d 473, 474-75 (1955); *Parker v. Energy Dev. Co.*, 691 P.2d 981, 985 (Wyo. 1984).

Courts have refused to expand the exceptions to workers' compensation exclusivity out of a belief that such exclusivity is essential to the preservation of the legislative bargain underlying the acts. See *Millison*, 101 N.J. at 177, 501 A.2d at 513; Note, *supra* note 4, at 1661. Judicial adherence to a strict reading of the exclusive remedy rule has been criticized by commentators as reflecting "an overly narrow view of the judicial role." Note, *supra* note 4, at 1653. Judicial reluctance, however, may be explained by the fact that only a minority of state legislatures have enacted exceptions. See *supra* note 5.

⁵⁴ See *Mandolidis v. Elkins Indus., Inc.*, 161 W. Va. 695, 246 S.E.2d 907 (1978). In *Mandolidis*, the Supreme Court of Appeals of West Virginia adopted "substantial certainty" as its standard of requisite intent, *see id.* at 706 n.9, 246 S.E.2d at 914 n.9, holding that an employer who committed an intentional tort or engaged in willful, wanton and reckless misconduct resulting in injury to an employee would no longer be protected from civil liability by West Virginia's workers' compensation act. *See id.* at 706, 246 S.E.2d at 914. This decision rejected the previous "deliberate intent" interpretation given West Virginia's statute, W. VA. CODE § 23-4-2(2) (1985), and was widely criticized. See *Mandolidis*, 161 W. Va. at 719, 246 S.E.2d at 921 (Neely, J., dissenting); Note, *In The Wake of Mandolidis: A Case Study of Recent Trials Brought Under the Mandolidis Theory*, 84 W. VA. L. REV. 893, 897-98 (1982); 2A A. LARSON, *supra* note 1, § 68.13, at 13-8 & n.10.1. It was claimed that, as a result of this holding, ensuing verdicts were exorbitant, and that the number of employee claims and the costs of settlements increased. See Note, *supra*, at 927-28. This holding has been characterized as "distinctly out of line" with the almost "unanimous" rule requiring actual intent to injure. See 2A A. LARSON, *supra* note 1, § 68.13, at 13-8 & n.10.1. Other jurisdictions have specifically rejected the *Mandolidis* interpretation as well. See *VerBouwens v. Hamm Wood Prods.*, 334 N.W.2d 874, 877 (S.D. 1983) (Wollman, J., concurring specially).

Finally, in 1983, the West Virginia Legislature statutorily overruled *Mandolidis* and defined deliberate intent as "actual, specific intent." See W. VA. CODE § 23-4-2(2)(i) (1985). The legislature stated that the intent standard was not satisfied by conduct producing results not specifically intended, by grossly negligent conduct, or by reckless misconduct. See *id.*

In 1982, the California Legislature similarly rejected the California Supreme Court's creation of a "dual-capacity" exception in *Johns-Manville Prods. Corp. v. Contra Costa Superior Court*, 29 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980), by amending the California Labor Code to codify some of the judicially created exceptions to the exclusive remedy rule and thereby preventing its further erosion by the judiciary. See 1982 Cal. Stat. 922, § 6 (codified as amended at CAL. LAB. CODE § 3602(a), (b)(2) (Deering Supp. 1986)); *see also* 1982 California Legislation, 14 PAC. L.J. 763 (1983).

tainty" standard did not overreach judicial authority, and that proper application of the standard would further the New Jersey Legislature's stated policy of favoring protection of the health of industrial workers.⁵⁵

Additional support for the full application of the "substantial certainty" standard can be found in the procedural setting of *Millison*. On a motion for summary judgment the plaintiffs' claim must be viewed in its most favorable light.⁵⁶ Here it would be assumed that du Pont had exposed its workers with full knowledge of the consequences.⁵⁷ Based on this view of the facts, it is submitted that this claim met the test for "substantial certainty" as enunciated by the court.⁵⁸ The danger of asbestos exposure and inhalation has long been industry knowledge.⁵⁹ Moreover, the plaintiffs alleged that du Pont possessed this knowledge, and thus knew with substantial certainty that the level of asbestos in its plants would eventually cause harm to its employees.⁶⁰ The exis-

⁵⁵ See N.J. STAT. ANN. §§ 34:5A-1 to -31 (West Supp. 1986) ("Worker and Community Right to Know Act"); N.J. STAT. ANN. § 34:5A-32 (West Supp. 1986) ("Asbestos Services"); N.J. STAT. ANN. §§ 34:6A-1 to -19 (West Supp. 1986) ("Worker Health and Safety Act"); see also *supra* note 46 (discussion of policy rationales of these enactments).

⁵⁶ *Judson v. Peoples Bank & Trust Co.*, 17 N.J. 67, 73-75, 110 A.2d 24, 27 (1954).

⁵⁷ See *Millison*, 101 N.J. at 195-96, 501 A.2d at 523 (Handler, J., concurring in part and dissenting in part).

⁵⁸ See *id.* (Handler, J., concurring in part and dissenting in part). The plaintiffs' intentional exposure claim is based on the supposition that du Pont knew, with substantial certainty, that the asbestos would cause the disease which did in fact occur. See *id.* (Handler, J., concurring in part and dissenting in part). The second count, in essence, similarly alleges that du Pont knew, with substantial certainty, that afflicted workers' conditions would worsen by continued exposure. *Id.* at 166, 501 A.2d at 508. To recognize only the latter count as valid is "unnecessarily and unfairly strict." *Id.* at 196, 501 A.2d at 523 (Handler, J., concurring in part and dissenting in part). It is submitted that the court's artificial dissection of the counts substantially weakens its holding.

⁵⁹ The danger of asbestos has been known since the 1920's. See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1083-85 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); *Johns-Manville v. Contra Costa Superior Court*, 27 Cal. 3d 465, 469, 612 P.2d 948, 950, 165 Cal. Rptr. 858, 860 (1980). Asbestos is an "unavoidably unsafe product" within the meaning of § 402A of the Restatement (Second) of Torts. See *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357, 372 (E.D. Pa. 1982); see also Note, *Workers' Compensation and The Asbestos Industry*, 33 SYRACUSE L. REV. 1073, 1076-78 (1982) (discussing history of knowledge about asbestos' dangerous propensities); B. CASTLEMAN, *ASBESTOS: MEDICAL AND LEGAL ASPECTS* 1-36 (1985) (development of knowledge of asbestosis). But see *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 337 (5th Cir. 1982) (reversing order allowing plaintiff to proceed without proving asbestos to be unreasonably dangerous); *Migues v. Fibreboard Corp.*, 662 F.2d 1182, 1189 (5th Cir. 1981) (reversing reliance on *Borel* as holding that asbestos products are unreasonably dangerous as matter of law).

⁶⁰ See *Millison*, 101 N.J. at 196, 501 A.2d at 523-24 (Handler, J., concurring in part and dissenting in part).

tence of this knowledge was therefore a genuine issue of fact and should have been presented to a jury.⁶¹

Case law in other jurisdictions also provides strong corroboration for the adoption of the "substantial certainty" standard.⁶² In *Blankenship v. Cincinnati Milacron Chemicals, Inc.*,⁶³ several employees alleged that their employer had knowingly and intentionally exposed them to noxious chemical fumes.⁶⁴ The Ohio Supreme Court allowed the tort claim, holding that, inasmuch as the exposure may have been an intentional wrong, there existed an issue for the trier of fact.⁶⁵ Recognizing that intent plays an important part in determining if an injury is covered by workers' compensation, the Ohio court nonetheless strongly emphasized the public policy arguments for allowing a victimized employee to sue in tort.⁶⁶ It is

⁶¹ See C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 99 (2d ed. 1970). As the claims involve du Pont's state of mind and extent of knowledge, summary judgment should not be granted. See *Hart v. Johnston*, 389 F.2d 239, 241-42 (6th Cir. 1968) (per curiam); *Alvarado v. General Motors Corp.*, 229 F.2d 408, 412 (2d Cir. 1956) (opinion revised); *Ruvolo v. American Casualty Co.*, 39 N.J. 490, 500, 189 A.2d 204, 209-10 (1963); *Judson v. Peoples Bank & Trust Co.*, 17 N.J. 67, 76, 110 A.2d 24, 28 (1954).

⁶² See *Boudeloche v. Grow Chem. Coatings Corp.*, 728 F.2d 759, 761 (5th Cir. 1984) (per curiam); *Jones v. VIP Dev. Co.*, 15 Ohio St. 3d 90, 95, 472 N.E.2d 1046, 1051 (1984); *Reed Tool Co. v. Copelin*, 689 S.W.2d 404, 406 (Sup. Ct. Tex. 1985).

⁶³ 69 Ohio St. 2d 608, 433 N.E.2d 572, cert. denied, 459 U.S. 857 (1982).

⁶⁴ See *id.* at 608-09, 433 N.E.2d at 573-74.

⁶⁵ See *id.* at 615-16, 433 N.E.2d at 578.

⁶⁶ *Id.* at 614-15, 433 N.E.2d at 577. The court read Ohio's liberal construction clause of the Ohio workers' compensation act to mean that, as workers' compensation was meant to remedy injuries "arising out of" employment, injuries, such as intentional torts, were not covered by the act. See *id.* at 612-14, 433 N.E.2d at 575-76. The court did not determine whether the employer's conduct was intentional, but merely stated that a cause of action existed. *Id.* at 615-16, 433 N.E.2d at 578.

Chief Justice Celebrezze stated that denying the employees a cause of action for intentionally inflicted injuries would allow corporations the ability to "cost-out" an investment decision to kill workers." *Id.* at 617, 433 N.E.2d at 579 (Celebrezze, C.J., concurring).

Blankenship has evoked both positive and negative responses, with most of the criticism centering on the court's statutory analysis. See Note, *supra* note 29, at 366-73; see also Note, *supra* note 6, at 429-35 ("progressive and enlightened" decision flawed by faulty reasoning and failure to define "intentional wrong").

At least one commentator has approved of the modern trend typified by the *Blankenship* case, as being "consistent with the original purposes and goals of workers' compensation acts, in that it [fully affords] a separate remedy for employees forced to work under hazardous conditions by employers who are fully aware of the risks involved. . . ." Perlin, *supra* note 2, at 878. Another commentator, however, has advocated that, rather than allow the employee to resort to a tort claim, an increased benefit should be paid by the employer for an intentional wrong. See Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 814 (1982).

It is submitted that inasmuch as the New Jersey Act contains a statutory exception, a holding similar to *Blankenship* in *Millison* would not have been vulnerable to the same

submitted that these policy arguments, which have been partially crystallized by the New Jersey Legislature, favor an expansion of the intentional wrong exception to the New Jersey Workmen's Compensation Act.⁶⁷

CONCLUSION

By enacting an intentional wrong exception to the otherwise exclusive Workmen's Compensation Act, the New Jersey Legislature recognized that employers should not enjoy complete tort immunity. The Supreme Court of New Jersey, however, has unnecessarily clouded the determination of an intentional wrong by adopting a standard progressive in name but not in application. The court has attempted to expand employees' rights and, at the same time, preserve the scope of the workers' compensation system. This approach, however, has merely infused a sensitive area with ambiguity. Had the court followed the progressive standard it purported to adopt, it would have reached a more ameliorative result, thereby furthering the aim of workers' compensation to remedy the plight of uninformed workers and to deter employers from fostering ignorance of environmental hazards.

Vincent B. Tritto

statutory criticism that was levelled at *Blankenship* for simultaneously creating and expanding an exception to the exclusivity provision.

⁶⁷ See N.J. STAT. ANN. §§ 34:5A:-1 to -31 (West Supp. 1986); *supra* note 46. While the *Millison* court found the "Right to Know Act" to foreclose further expansion of the exception, see 101 N.J. at 180-81, 501 A.2d at 515-16, it is suggested that granting an independent common-law tort claim for intentional exposure to dangerous substances clearly effectuates the policies of the "Right to Know Act." See generally Note, *supra* note 4, at 1661 (judicial recognition of exceptions contributes to achievement of safety, compensation, and equity goals).